No. 80-458

Supreme Court U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF SOUTH LAKE TAHOE, ROGER CAPRI, as Mayor of the City of South Lake Tahoe; JOHN WYNN, ROBERT KAUFMAN, WILLIAM MOYER and PATRICIA LOWE, as City Councilmembers of the City of South Lake Tahoe,

Petitioners,

vs.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, and GORDON HOOPER, GERALD M. POZNANOVICH, JAN CHATTEN-BROWN and KENNETH L. WOODWARD, individually and as members of the Governing Body of the California Tahoe Regional Planning Agency,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply Brief for Petitioners

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Respondents urge that a writ of certiorari not issue in this case for three reasons: (1) the abstention doctrine precludes consideration by the federal courts of any issue which is local in character and which invokes unresolved state law questions; (R.B. pp. 8-16)[1] (2) the Petitioners lack standing because they seek to assert rights

1. Respondents' Brief In Opposition is referred to as "R.B.".

of third parties and their own injuries are speculative (R.B. pp. 16-29); (3) the issues presented by Petitioners likely will be moot (R.B. pp. 29-30). None of these arguments has merit.

I.

THE ABSTENTION DOCTRINE IS INAPPLICABLE

A. Invocation of the Abstention Doctrine Is Premature.

As the Court of Appeals below recognized, the question of standing must be resolved before the abstention issue arises: "[S]tanding must be ascertained before a court proceeds to exercise its discretion to abstain. . . . Only after a court is satisfied that standing and the other jurisdictional prerequisities are met may it determine, within its discretion, whether to abstain." 625 F.2d 231, 232-233. Thus, at this stage of the proceeding, consideration of the abstention issue is premature. Certainly it would be inappropriate for this Court to decide the case on the basis of an issue that was not considered by the Court of Appeals, rather than on the standing issue which was dispositive of the case in the Court of Appeals. However, if this Court were to decide the issue on that basis, it should only be after full briefing and argument.

B. The Action Does Not Involve Controlling State Law Issues.

Contrary to the repeated assertions of Respondents, state law issues are not controlling in this proceeding. First, the federal constitutional claims made by Petitioners are not before any state tribunal in any proceeding in which Petitioners are parties. Thus, the prosecution of this case presents no risk of "duplicative litigation." Second, the federal constitutional issues Petitioners have raised are separate from and independent of the state law claims which Petitioners may have against Respondents. Indeed, all state law issues between Petitioners and Respondents are the subject of a settlement agreement between them, which specifically reserves the federal claims included in these proceedings. Finally, the adoption of reasonable regulations for the preservation of the

Lake Tahoe Basin involves important federal policies. They are not merely a matter of local concern. Accordingly, under neither the so-called *"Pullman"* nor *"Burford"* doctrine is abstention appropriate.

II.

PETITIONERS HAVE STANDING

Both the City and the City Councilmembers have standing. That they are targets of litigation, both actual and threatened, is documented in Respondents' Reply Brief. Whatever the views of the Respondents with respect to immunity for "performing a purely ministerial duty imposed by state law" (R.B. p. 28), this Court has never recognized such a defense. The issue is one of extreme importance to all city officials, and if a rule similar to the one discussed by the Court of Appeals in *Jacobson v. Tahoe Regional Planning Agency,* 566 F.2d 1353 (9th Cir. 1978), *rev'd on other grounds, aff'd on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391 (1979), is to become the law of the land, this Court should grant the writ and formulate the rule so that it can be implemented on a uniform basis.

With respect to the City's standing to sue, for the reasons stated in their petition, Petitioners believe the authorities based on *Hunter v. Pittsburgh,* 207 U.S. 161 (1907), are inapposite. However, if the rule is deemed to deny standing to municipalities where important federal constitutional issues are raised, it should be reexamined in view of the many recent decisions of this Court expanding civil liability of municipalities and their officials.

III.

THE CASE IS NOT AND WILL NOT LIKELY BECOME MOOT

As Respondents concede, this case is not now moot. That should be the end of the issue.

Nor is the case likely to become moot in the future. First, the enactment of H.R. 8235 is itself speculative. Second, if the statute

is eventually enacted, the final form it will take is currently uncertain. Third, even if the statute is enacted in its present proposed form, the case will not become moot since the statute does not do away with CTRPA but merely suspends its operations.[2] Thus, whatever the temporary fate of CTRPA, Petitioners face the real possibility that CTRPA will be resurrected and that the very risk this litigation seeks to resolve will recur. That risk alone is sufficient to warrant the prosecution of this action. *United States v. Concentrated Phosphate Export Ass'n., Inc.*, 393 U.S. 199, 202-204 (1968).

IV.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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2. In all events, in its present form, the statute requires TRPA to adopt the unconstitutional CTRPA regulations. Petitioners face the identical untenable choice between obeying their oaths of office or enforcing the unlawful regulations.